said: "In all this I don't say the husband intended the ruin of his wife, and was looking for a divorce as the consequence; but if the legal presumption be applied, that any man is to be presumed to intend the legitimate consequences of his deliberate acts, such a conjecture is not unreasonable." There were some other circumstances, however, tending to show that the husband had become more or less attached to a female servant in his employment, though no criminal conduct was alleged or shown; but it was thought that this might have led the wife to the more frequent use of morphine, and so tended to form the habit complained of.

The doctrine of conducement merely, without connivance, desire, or intention that adultery should be committed, must be more fully examined and considered before it can be held to be clearly established. EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Indiana Supreme Court.

CITY OF NORTH VERNON *v.* VOEGLER.

Where there is one cause of action all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action cannot be maintained.

Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action, and in a suit on that cause of action all damages present and prospective may be recovered, and for fresh damages resulting from the improvement, a second action will not lie.

Mitchell v. *Darley Main Colliery Co.*, 24 Am. L. Reg. (N. S.) 432, and *Brunsden* v. *Humphrey*, Id. 369, criticised and distinguished.

Semble: A temporary wrong might be done under such circumstances as would make it reasonable to presume that the defendants would right the wrong before a recurrence of harm or loss, and in such cases a second action might lie for fresh damage.

Although a municipality is not liable for errors of judgment in devising a plan of improvement, it is liable if the lack of care and skill in devising the plan is so great as to constitute negligence.

APPEAL from Jennings Circuit Court.

John G. Berkshire, for appellant.

The opinion of the court was delivered by

ELLIOTT, J.—There are two paragraphs in the appellee's complaint, both alleging that the appellant so negligently and unskilfully graded one of its public streets as to change the flow of surface water, gather it in one channel, and pour it upon the lots of the appellee, greatly injuring her property.

The first paragraph of the complaint differs from the second in

one particular, and that is in alleging that a former action was commenced by the appellee which resulted in a judgment in her favor. The allegations upon this subject are these: "That in September 1879 the plaintiff brought suit against the defendant for the damages then accrued to her by reason of the overflowing and injury of her premises up to that time; that in March 1880 she recovered judgment in that action for eighty dollars so accrued up to September 1879; that all of said overflowings of said premises have continued, as also the other said injuries to plaintiff's premises ever since September 1879, when the former action was brought, but the defendant has done nothing and made no effort to change or prevent said flow of water over the lot of plaintiff." On these averments the appellant founds the objection to the complaint that it shows on its face that the matter pleaded has been adjudicated; but as there are answers which more clearly present the question, we defer our consideration of it until we take up those answers.

The second paragraph of the answer is in substance this: That the improvement of the street was made under an ordinance and a plan of the common council, duly enacted and adopted; that the improvement of the street was, in the judgment of the common council, necessary and proper; and that the injuries complained of were the unavoidable result of the improvement of the street.

The sufficiency of this answer is sought to be maintained upon the decision in *Rozell* v. *City of Anderson*, 91 Ind. 591, but that decision is very far from sustaining such an answer as the one before us. In that case the evidence was not in the record, as the opinion shows, and the court was simply called upon to determine whether the instruction assailed was correct upon any supposable state of the evidence admissible under the issue in the case. We have no doubt that the ruling in that case was right upon the question as the record presented it. We hold now, as we held then, that, as an abstract rule of law, a municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement; but we did not then hold, nor do we now hold, that for negligence, whether in the plan of the work or its execution, a municipal corporation is not liable. That we did not then hold that for negligence the municipal corporation is not liable is evident from the fact that the court, in the opinion given in that case, cites with approval the cases which hold a municipal corporation liable for negligence in the plan of an improvement as well as in the

manner of executing the work. We have many cases, extending from *City of Indianapolis* v. *Huffer*, 30 Ind. 235, down to *City of Crawfordsville* v. *Bond*, 96 Id. 236, holding that for negligence in devising a plan, as well as for negligence in executing it, the municipal corporation is liable. This was, in effect, the decision in the case appealed to this court by the appellant, involving the sufficiency of just such an answer as that now before us: *City of North Vernon* v. *Voegler*, 79 Ind. 67. The question was fully considered, and the authorities cited in the cases of *City of Evansville* v. *Decker*, 84 Ind. 325; *Cummins* v. *City of Seymour*, 79 Id. 491; s. c. 41 Amer. Rep. 618; *Weis* v. *City of Madison*, 75 Ind. 241; s. c. 39 Amer. Rep. 135; *City of Indianapolis* v. *Tate*, 39 Ind. 282; *City of Indianapolis* v. *Lawyer*, 38 Id. 348. The doctrine is not only sustained by authority, but is sound in principle. Suppose that a common council of a city determine to build a sewer and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or, to take such a case as *City* v. *Huffer*, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council to devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child, can the city escape liability on the ground that there was only an error of judgment in devising the plan?

Illustrations might be indefinitely multiplied, but it is unnecessary to pursue the subject. The only rule that has any valid support in principle is, that for errors in judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence. Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets where the work is done in a careful and skilful manner; but they have quite as steadily maintained that where the work is done in a negligent and unskilful manner, the corporation is liable for injuries resulting to adjacent property: *City of Kokomo* v. *Mahan*, 100 Ind. 242, 246; *City of Crawfordsville* v. *Bond*, *supra*; *Princeton* v. *Gieske*, 93 Ind. 102; *Weis* v. *City*

of Madison, 75 Id. 241; s. c. 39 Amer. Rep. 135; *City of Evansville* v. *Decker*, *supra*, and authorities cited; *Macy* v. *City of Indianapolis*, 17 Ind. 267.

The complaint in this case very fully alleges the negligence and unskilfulness of the defendant, and an answer admitting these allegations cannot avoid them by averring, as the one before us does, that the negligence and want of skill were not in doing the work, but in devising the plan. We have not considered the fugitive denials cast into the answer, for the reason that it is now well settled that pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them: *Neidefer* v. *Chastain*, 71 Ind. 363; *W. U. Tel. Co.* v. *Reed*, 96 Id. 195, 198.

There are several paragraphs of answer pleading a former adjudication, and we perceive no substantial difference between them; but, as we are not aided by a brief from the appellee, and as the third paragraph presents the question in a clearer light than the others, we confine our investigation and decision to that paragraph. The material averments of this paragraph, exhibited in a condensed form, are these: On the eighteenth day of September 1879, the appellee filed her complaint in the Jennings Circuit Court against the appellant, and in the action thus begun the appellee recovered judgment for $80 at the March term, 1880. This judgment remains in full force. The complaint in that action stated as a cause of action the injuries to the same property from the same negligent and unskilful improvement of the same street as that described and charged in the present action. The appellant has made no other improvement than the one described in the former complaint, and the injuries resulting to appellee's property were such only as were caused by the improvement made prior to the filing of the complaint in the action begun in September 1879. The concluding averment of the answer is this: "And it is the grading of the same street, and the building of the same culverts, and the identical negligence and want of care and skill now complained of, that was complained of in the former action, and no other."

The answer presents a question of great importance and much difficulty. The theory of the appellee, as we infer from the record, is that the former action embraced only such damages to the real estate as occurred prior to the recovery of the judgment in that action. The theory of the appellant is that the former action

embraced all damages resulting to the appellee's property from the negligent improvement of the street, and that a second action cannot be maintained for the same breach of duty that formed the basis of the first action. There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act; the term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognised a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. Brown Leg. Max. 195; Weeks Dam. Inj. 7; Brown Comm. (4th ed.) 75, 621. In every valid cause of action two elements must be present, the injury and the damages. The one is the legal wrong which is to be redressed; the other, the scale or measure of the recovery. Mayne Dam. 1; 1 Suth. Dam. 3. As there may be damages without an injury, so there may be an injury without damages. It has been many times said that no action will lie because the injury produced no damages, or, as the law phrase runs, the wrong is *injuria sine damno*. The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and to enforce our statement by reference to authorities, although the principle involved is a rudimentary one. The distinction is important, for the reason that the law is that fresh damages without a fresh injury will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner* v. *Bacon*, 8 Gray 397: "A fresh action cannot be brought unless there be both a new unlawful act and fresh damage." The rule is illustrated by many cases. Mr. Mayne refers to the case of *Howell* v. *Young*, 5 Barn. & C. 259, and commenting on it, says: "The statute of limitations runs from the act of negligence, not from the time an injury accrues. Such injury is merely a consequential damage, not a fresh cause of action. The damages, then, in the original action must cover all the loss that can ever arise, because no such loss can afterwards be compensated." Mayne Dam. 611. An American author says: "A cause of action and the damages recoverable therefor are an entirety. The

party injured must be plaintiff, by the common law, and he must demand all the damages which he has suffered or ever will suffer from the injury, grievance, or cause of action, upon which his action is founded. He cannot split a cause of action and bring successive suits for parts because he may not be able to prove at first all the items of the demand, or because all of the damages have not been suffered." 1 Suth. Dam. 175. The rule we are discussing applies to cases of personal injuries, for, among the earliest of the reported cases, we find it laid down for law that in an action for trespass to the person the recovery of damages must be once for all, including past as well as prospective damages. *Fetter* v. *Beale*, 1 Salk. 11; s. c. 1 Ld. Raym. 339. In *Hodsoll* v. *Stallebrass*, 39 E. C. L. 301, it was held that both injury and damage must concur to give a cause of action; that the damages were not the sole cause of action; and the jury were directed to assess both present and prospective damages, because a second action could not be brought for damages resulting from the same injury.

Upon this ancient doctrine rest the cases which hold that where personal injuries are received from the negligent act of a carrier of passengers, or are caused by the negligence of a municipal corporation, all the damages, present and prospective, must be assessed in one action, because a second action cannot be brought. *Town of Elkhart* v. *Ritter*, 66 Ind. 136; *Weisenberg* v. *City of Appleton*, 26 Wis. 56; *Whitney* v. *Clarendon*, 18 Vt. 252; s. c. 46 Amer. Dec. 150; 1 Suth. Dam. 197, authorities in note, p. 198. Mr. Mayne, in discussing this general subject, says: "Similar questions often arise in cases where a person, by digging, mining, building, or the like, affects the plaintiff's house in such a manner as to produce injurious consequences which manifest themselves at a later period. Here it is now well settled that all subsequent or recurring damages may be assessed, and can only be recovered in a suit brought upon the original cause of action." Mayne Dam. 138. In *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503, the doctrine declared by the author from whom we have quoted is asserted. There is, however, a later English case which seems to break in upon the rule of the earlier cases, and to shake, in some degree at least, their authority. It does, indeed, expressly overrule the case of *Lamb* v. *Walker*, 3 Q. B. Div. 389. The case to which we refer is *Mitchell* v. *Darley Main Colliery Co.*, 24 Amer. Law Reg. 432. If that case can be regarded as well decided, it must be deemed an exception to the

general rule, for the general rule is that one action, and one only, can be maintained for a breach of duty constituting a tort. The English court seems to have gone still further in opposition to the ancient rule in *Brunsden* v. *Humphrey*, 24 Amer. Law Reg. 369; but in that case Chief Justice COLERIDGE dissented, and an able reviewer says: "It certainly seems that the reasoning of COLERIDGE, C. J., is more in harmony with the established rule of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below (11 Q. B. Div. 712), were on the same side, so that really the majority of the judges who have expressed opinions on the subject are against successive actions in such cases." Id. 378. These English cases may, however, be distinguished from the one we are discussing, for, in this case the improvement of the street was a permanent one, while in the only one of these English cases that is analogous to the present, the act out of which the wrong arose was of a different character.

The case before us is closely analogous to the seizure of land under the right of eminent domain for railroad or highway purposes, and in all such cases it is held, both by the English and the American courts, that all the damages, present and prospective, must be assessed in one proceeding: *Lafayette, &c., Co.* v. *New Albany, &c., Co.*, 13 Ind. 90; *Montgomery, &c., Co.* v. *Stockton*, 43 Id. 328; 1 Suth. Dam. 191. In the case of *Powers* v. *Council Bluffs*, 45 Iowa 652; s. c. 24 Amer. Rep. 792, the city cut a ditch along the side of plaintiff's lot and caused his land to be overflowed, and it was declared that the cause of action was complete when the unlawful act was committed, and that all the damages accruing from the original wrong must be included in one action. It is true that this case has been criticised, but the criticism does not affect its force upon the point to which we cite it: Wood St. Lim. 372. The criticism upon the case is that the court erred in holding that the cause of action accrued when the ditch was dug, for the reason that no damages at all accrued until some time after the ditch was dug, and until the damages did accrue there was no complete cause of action. Conceding, but not deciding, that the criticism is just, it does not break the force of the decision as applied to this case; for here there were both damages and injury before the first action was commenced, and Mr. Wood concedes, or rather affirms, that if the element of damages had been present in the case cited the decision would be right. In *Town of Troy* v. *Cheshire Rd.*, 23

N. H. 83, it was held that, "in case for nuisance, if the act done is necessarily injurious and is of a permanent character, the party injured may at once recover his damages for the whole injury." In that case the injury to the town was done by the construction of a railroad, and the court said: "The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done they are entitled to recover at once their reasonable damages." It is true, in the present case, as it was in the one referred to, that the improvement of the street was a permanent one, and, as it was permanent, the cause of action was complete when damages resulted, and the recovery must be, not for part of the damages, or for some damages, but for all the damages resulting from the wrong which constituted the cause of action. Turning to a somewhat different line of cases, we find running through them all the same general principles found in the cases we have cited. Thus, in actions against an attorney for negligence, the rule is that all loss resulting from the wrong must be recovered in one action, and no subsequent action can be maintained; *Wilcox* v. *Plummer's Ex'rs*, 4 Pet. 172; *Moore* v. *Juvenal*, 92 Penn. St. 484; *Campbell's Adm'rs* v. *Boggs*, 48 Id. 524; *Downing* v. *Garard*, 24 Id. 52; *Miller* v. *Wilson*, Id. 114; *Owen* v. *Western Saving Fund*, 97 Id. 47; s. c. 39 Amer. Rep. 794; *Howell* v. *Young*, 5 Barn. & C. 259.

In *Owen* v. *Western Saving Fund*, *supra*, the last case cited was approved, and it was said of it: "And in this case it was held that special damages resulting from a breach of duty do not constitute a fresh ground of action, but are merely the measure of the injury resulting from the original cause." The general principle we are discussing was involved in the case of *Richardson* v. *Eagle Machine Works*, 78 Ind. 422, where it was held that an agent who elected to bring an action for wages could not bring a second action to recover damages for a breach of the contract stipulating that the employment should continue for one year. In *Crosby* v. *Jeroloman*, 37 Ind. 264, the court quoted with approval from the opinion in *Secor* v. *Sturgis*, 16 N. Y. 548, the following: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong and against several actions on the same contract." The general rule, as stated by a recent

author, is this: "When a wrong is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful acts, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action:" 3 Suth. Dam. 403. In *Adams* v. *Hastings, &c., Co.*, 18 Minn. 265 (Gil. 236), this rule was enforced. The court, speaking of the construction of a railroad, said: "And if such erection necessarily caused the surface water to stand upon the plaintiff's land and run into his cellar and well, he could recover therefor in the same action, though such injury might not accrue for some time after the completion of the road-bed and track." This general principle is also maintained in *Seely* v. *Aldern*, 61 Penn. St. 302.

There are many cases declaring and enforcing the general rule that the plaintiff may recover in one action all the damages he suffers, whether retrospective or prospective, where the injury which causes the loss or harm is of a permanent character, as a street, a canal, or a railroad. All things that proximately contribute to the injury may be taken into consideration in estimating the damages, and if the injury extends so far as to totally destroy the value of the property, then damages equal to the value of the property may be awarded. Mr. Freeman states the rule very strongly. His statement is this: "All the damages which can by any possibility result from a single tort form an indivisible cause of action." He also says: "For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be sustained:" Freem. Judgm., § 241. The cases of *Cadle* v. *Muscatine W. R. Co.*, 44 Iowa 11; *Finley* v. *Hershey*, 41 Id. 389; *Illinois Cent. Rd. Co.* v. *Grabill*, 50 Ill. 241; *Elizabethtown, &c., Co.* v. *Combs*, 10 Bush 382; *Jeffersonville, &c., Co.* v. *Estelle*, 13 Id. 667, illustrate and enforce the principles we are discussing. In *Fowle* v. *New Haven, &c., Co.*, 112 Mass. 334, language is used which so forcibly applies here that we quote it: "The case at bar," said the court, "is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of proper care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is permanent in its character, or which is treated as

permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

As probable future damages may be taken into consideration in an action to recover for a loss caused by the negligence of corporate officers in constructing a public work of a permanent character, the plaintiff in such an action can recover all the damages he has sustained, and in all such cases no second action can be maintained. To permit a second action to recover damages resulting from the negligent grading of a street, would be to allow successive damages to be awarded where there was no fresh wrong. Great injustice would almost inevitably result from a rule permitting successive actions, for it would be impossible to prevent damages from being twice assessed for the same wrong.

The ultimate conclusions to which these authorities lead are: *First.* That where there is one cause of action all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong a second action cannot be maintained. *Second.* Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action; and in a suit on that cause of action all damages, present and prospective, may be recovered, and for fresh damages resulting from the improvement a second action will not lie.

The complaint of the appellee, as we have seen, is based upon the negligence of the corporate officers in improving a street and the improvement is a permanent one, so that the tort which formed the basis of the action was complete when damages resulted.

The answer avers, and the demurrer admits, that there was no new wrong or negligence. As the pleadings stand, there is a single wrong, and nothing more. The fresh damages do not, as the pleadings aver, arise from a new or fresh wrong. The case, therefore, is not within the authorities which hold that where there is a new neglect or a fresh wrong there may be a second action.

The answer avers that the injury complained of is the same as that declared on in the former action. It goes even further, for it affirmatively shows that no improvement has been made, and that no grading has been done since that described in the former complaint. The causes of action are therefore the same. Where the answer avers the causes of action to be the same, and the record does not show them to be different, the averment is taken to be true

on demurrer: *Cutler* v. *Cox*, 2 Blackf. 178. If the causes of action are not the same, that fact must be replied: *James* v. *State*, 7 Blackf. 326.

We have upon the pleadings, therefore, a case where there are fresh damages, but where there is no fresh cause of action; for the utmost that can be yielded to the appellee is that the record shows that damages have resulted since the first action, flowing, however, from the original wrong. We need not decide what might be successfully replied; we simply decide the question before us, and our decision is, that the answer sufficiently pleads a former adjudication.

We have already placed stress upon the fact that the construction of the highway is permanent, and that the wrong was complete when the street, as a permanent work, was finished and damages resulted. We deem it proper to emphasize this element of the case, for we can readily conceive cases of an essentially different character where a very different rule would apply. We can conceive of cases where a temporary wrong might be done under such circumstances as would make it reasonable to presume that the defendant would right the wrong before a recurrence of harm or loss, and in such cases it might well be that the plaintiff could bring a second action. We know that there are cases where it is proper to presume that the wrongdoer will not maintain the unlawful thing that caused the harm or loss: Mayne Dam. 141, § 110.

But the case upon which we are pronouncing judgment, and to which we confine our decision, is one where the improvement of the street was a complete and permanent fact, and where the parties must presume that it was permanent in its character, and that it was intended that the thing done should remain unchanged. It cannot be presumed that municipal officers, having built a street or road, intended it to be temporary. A presumption that the wrong was not of a permanent character might, perhaps, obtain where a natural watercourse is temporarily obstructed, or where, in the course of improving a street, water was thrown upon a lot; but it cannot prevail where the improvement of the street is complete and the street permanently constructed. This is not the case of a nuisance. It is the case of a negligent improvement of a street. The improvement was in itself rightful and legal but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is

not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that the continuance of a nuisance will supply ground for an action have no influence upon this case.

Judgment reversed.

1. The authorities are so fully cited upon the first branch of the principal case, that any further citations upon the well-settled principles there announced would be useless. All the cases agree upon them, and it is only in this application that differences arise. We proceed to a consideration of the second branch of the case.

2. It is elementary that there can be no recovery of damages sustained, unless there was an injury which caused the damages sought to be recovered, or from which the damage directly or proximately flowed. Before the complaining party can recover he must show an injury done to him, either to his person, property or rights; and then the law will recompense him by compelling the party in the wrong to pay him a sum of money, supposed to be commensurate with his loss. The word "injury" for which damages are allowed is such an one as the law recognises, a "legal injury;" and a right to recover damages is a "legal right." Wherever it is said there is no "right" without a remedy, a "right," such as the law recognises, is meant; for there are many rights for the deprivation of which the law gives no remedy: Cooley on Torts 19.

In the nature of things, as well as in law, damage and injury are inseparable: without a damage there is no injury, and an injury necessarily draws with it a damage. Yet there are, in many instances, damages suffered as to which in law the fiction is adopted that they arise without an injury, or are *damnum absque injuria*. For these no action lies: Broom Max. 195; *Hall* v. *Mayor of Bristol*, L. R., 2 C. P. 322; *Smith* v. *Thackerah*, L. R., 1 C. P. 564; 1 Smith L. C. 361.

From this rule that every damage for which a recovery is allowed, has its corresponding injury, arises another rule that for every new or fresh damage sustained, there must be a corresponding new and fresh injury; and if there has been a recovery had for the injury inflicted, a second recovery for a new and fresh damage sustained since judgment pronounced cannot be had, because there is no corresponding injury. If the fresh damage accrued before trial had, evidence of it may be given so that the jury may more accurately measure the quantum of damages to be awarded: *Filer* v. *N. Y. Cent. Rd. Co.*, 49 N. Y. 42; *Hagan* v. *Riley*, 13 Gray 515; *Hayden* v. *Albee*, 20 Minn. 159; *Fort* v. *Union P. Rd. Co.*, 2 Dill. 259; *Hagan* v. *Riley*, 13 Gray 515. But where a judgment intervenes between the injury and the subsequent development of fresh damages, no cause of action can be maintained on account of these damages. Two reasons are assigned for this: First, there is no fresh injury, and the injured party has already recovered for the injury inflicted; second, the injury being permanent, or of some duration, the jury were authorized to award prospective, as well as past damages, and it is conclusively presumed that they did award both classes of

damages: *Weisenberg* v. *City of Appleton*, 26 Wis. 56; *Town of Elkhart* v. *Ritter*, 66 Ind. 136; *City of Indianapolis* v. *Gaston*, 58 Id. 224; *Miller* v. *Wilson*, 24 Penn. St. 114; *Howell* v. *Young*, 5 B. & C. 259.

But if the fresh damages arose from new injuries, perpetrated after the commencement of the action, then evidence of such fresh damages cannot be given; for a new action must be brought to recover them: *Hicks* v. *Herring*, 17 Cal. 566; *Troy* v. *Cheshire Rd. Co.*, 23 N. H. 102; *Phillips* v. *Terry*, 3 Keyes 313; *Robinson* v. *Bland*, 2 Burr. 1086.

That no action can be maintained for damages developed after verdict, and of which both the plaintiff and defendant were ignorant, and which could not be foretold by human science or ingenuity, is certainly a harsh rule, and one not calculated to inspire the moralist with a profound admiration of the law. It is true that the maxim *interest reipublicæ ut sit finis litium* (Broom's Max. 331), is here insisted upon; but maxims often work an injury rather than afford a redress for grievances. Thus, where money was paid, and a receipt taken which was lost, and the payer was by suit compelled to pay a second time; and afterwards finding the receipt, the payer brought suit for the money had and received, as to the last amount paid, it was held that no recovery could be had, and the doctrine of the maxim quoted was invoked to prevent a recovery: *Marriot* v. *Hampton*, 7 T. R. 269; see *Follett* v. *Hoppe*, 5 C. B. 238; *Smith* v. *Monteith*, 13 M. & W. 427; *Hom'et* v. *Richardson*, 9 Bing. 644. Modern legislation has often afforded relief in such instances, by providing for a new trial on account of newly discovered evidence.

The harshness of the rule insisted upon and applied in the principal case, evidently led the English court in *Mitchell* v. *Darley Main Colliery Co.*, 24 Am. Law Reg. (N. S.) 432, and note, to parry its thrust and raise a distinction in the cases, largely, if not in fact artificial. In the principal case it was the subsequent flooding that caused the damages; in the English case it was the subsequent subsidence that caused them. In the latter case it was held that there was a continuing duty imposed by law upon the defendant to keep the walls and roof of the mine propped, so that there would not be a fresh subsidence. Why was there not a continuing duty devolving upon the city to keep her streets—her property—in such a condition, that it would not cause a new damage? Damages had been allowed because the grading of the street had cast water upon the plaintiff's lot; and the subsequent suit was for a damage identical in its results. If suit had been brought before any damage was suffered, no verdict for the plaintiff, no doubt, could have been given. It is argued that the street improvement was permanent, and that such damage must, in the nature of things, again occur; and therefore the jury have awarded prospective damages. The same argument is applicable to the colliery case. In neither instance could the jury anticipate all the damages that would afterwards arise. If the plaintiff should wait a long time until he was sure he could lay before the jury evidence of all the damages he had sustained, he would probably be met with the plea of the statute of limitations: *Woodsworth* v. *Harley*, 1 B. & Ad. 391; *Roberts* v. *Read*, 16 East 215.

The case of *Brunsden* v. *Humphrey*, 24 Am. Law Reg. (N. S.) 369, and note, goes a step farther than the colliery case. The plaintiff's van was injured by the defendant's van, and he recovered damages therefor. Afterwards he sued for damages to his person, caused by some collision, and was allowed to recover. Lord COLERIDGE dissented, saying, "It seems to me a subtlety not warranted by law, to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two

actions, if besides his arm and leg being injured, his trousers, which contain his leg, and his coat-sleeve, which contains his arm, have been torn." Suppose the injured person had borrowed the trousers and coat, could not the owner have maintained an action for the injury to them, and the injured person for his personal injuries? Undoubtedly; and if two actions could thus be maintained by different persons, why not allow one person to bring them?

The doctrine of these two cases will, no doubt, find its place in our jurisprudence, although courts may not be willing to recognise it under the name it is here known; just as they constantly reiterate that a new trial will not be granted for impeaching or cumulative evidence, and yet seek to distinguish the newly discovered evidence produced from that charge in order that justice may be done.

But how are the cases? For an injury to his person by reason of a defective sidewalk, the plaintiff has but one action; in it he recovers past and prospective damages: *Leroy* v. *Springfield*, 81 Ill. 114; see *Crawford* v. *Gaulden*, 33 Ga. 173. And the same is true of injuries received in a railroad accident; and if the person does not recover for a long time, and delays suit until he can ascertain the amount of his damages, until the period of the statute of limitation has run from the time of the injury, his right of action will be barred: *Piller* v. *Southern Pacific Rd. Co.*, 52 Cal. 42; *Gustin* v. *Jefferson*, 15 Ia. 158.

So where an attorney-at-law neglected to prosecute a claim until it became barred at law, and he was neither guilty of fraud or concealment, it was held, in an action against him for damages, alleging special consequential damages, that the statute began to run in his favor, from the time of the breach of duty, although the special damages were not made definite or revealed until later: *Moore* v. *Juvenal*, 92 Penn. St. 484; s. c. 39 Am. Rep. 795; see also *Wilcox* v. *Plummer*, 4 Pet. 172; *Rhines* v. *Evans*, 66 Penn. St. 192; s. c. 5 Am. Rep. 364. And that the plaintiff may recover prospective damages, and can have only one action where only one injury is inflicted: see *Donaldson* v. *Mississippi, &c., Rd. Co.*, 18 Ia. 280; *Walker* v. *Erie Rd. Co.*, 63 Barb. 260; *Penn. Rd. Co.* v. *Books*, 57 Penn. 339; *Aaron* v. *Secoud Avenue Rd. Co.*, 2 Daly 127; *Drew* v. *Sixth Avenue Rd. Co.*, 26 N. Y. 49; *Filer* v. *N. Y. Cent. Rd. Co.*, 49 Id. 42; *Holyoke* v. *Grand Trunk Rd. Co.*, 48 N. H. 541; *Black* v. *Carrollton Rd. Co.*, 10 La. Ann. 33; *Frink* v. *Schroyer*, 18 Ill. 416; *Matteson* v. *N. Y., &c., Rd. Co.*, 62 Barb. 364; *Klein* v. *Jewett*, 26 N. J. Eq. 474; *Caldwell* v. *Murphy*, 1 Duer 233; *Memphis, &c., Rd. Co.* v. *Whitfield*, 44 Miss. 466; *Curtis* v. *Rochester, &c.. Rd. Co.*, 18 N. Y. 534.

Where a father brought suit for an injury to his child, and the suit was limited to the injury up to the time of bringing the action, it was held that a second suit for loss of service, arising by reason of injurious effects of the first injury, after the suit, could not be maintained: *Whitney* v. *Clarendon*, 18 Vt. 252; see *Waller* v. *Chicago*, 11 Ill. App. 209.

When property is taken for public use, or by a railroad or other corporation, the damages assessed must include future or prospective damage; and no second action can be brought, or writ of assessment obtained for damages afterwards sustained: *Perley* v. *B. C. & M. Rd. Co.*, 57 N. H. 212; *Waterman* v. *Connecticut Rd. Co.*, 30 Vt. 610; *Water Co.* v. *Chambers*, 13 N. J. Eq. 199; *Van Schoick* v. *Delaware Canal*, 20 N. J. L. 249; *Fowle* v. *New Haven Co.*, 112 Mass. 334; *Fowle* v. *N. H., &c., Rd. Co.*, 107 Id. 352; *Aldrich* v. *Cheshire Rd. Co.*, 21 N. H. 359; *Sawyer* v. *Keene*, 47 Id. 173; *Chesapeake Canal* v. *Grove*, 11 Gill & J. 398; *Call* v. *Middlesex*, 2 Gray 232; *Bake* v. *Johnson*, 2 Hill 342; *Evans* v. *Haefner*, 29 Mo. 141;

Montmorency G. Rd. Co. v. *Stockton*, 43 Ind. 328 ; *La Fayette Rd. Co.* v. *New Albany*, 13 Id. 90 ; *Missouri Rd. Co.* v. *Haines*, 10 Kan. 439 ; *Baltimore Rd. Co.* v. *Magruder*, 34 Md. 79 ; *Furniss* v. *Hudson Rd. Co.*, 5 Sandf. 551.

So an assessment for damages for land taken to widen a road, includes all damages occasioned by reducing the land so taken to the grade of such road, and consequently, where the grade of such road was subsequently changed, the damage occasioned by such change were held not to include any but such as arose by the alteration of the road in its entire width from the old established grade to the new grade : *Van Riper* v. *Essex Public Board*, 9 Vroom 23.

But in the case of a continuing nuisance, a recovery is allowed up to the date of the writ ; and for its continuance after that time, a new action lies ; for every continuance of the nuisance is a new nuisance : *Cole* v. *Sprowl*, 35 Me. 161 ; *Vedder* v. *Vedder*, 1 Denio 257 ; *Bare* v. *Hoffman*, 79 Penn. St. 71 ; *Savannah, &c., Rd. Co.* v. *Bourquin*, 51 Ga. 378 ; *Slight* v. *Gutzaiff*, 35 Wis. 675 ; *Queen* v. *Waterhouse*, L. R., 7 Q, B. 545 ; *Thayer* v. *Brooks*, 17 Ohio 489 ; *Anderson, &c., Rd. Co.* v. *Kernodle*, 65 Md. 314 ; *Hopkins* v. *Western Pacific Rd. Co.*, 50 Cal. 190 ; *Frendenstein* v. *Heine*, 6 Mo. App. 287 ; *Allen* v. *Worthy*, L. R., 5 Q. B. 163 ; *Bradley* v. *Amis*, 2 Hayw. 399. It is otherwise if the wrongful act produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful act ; then all the damage resulting, both before and after the commencement of the suit, may be estimated and recovered in one action : *Cooper* v. *Randall*, 59 Ill. 321 ; *Hayden* v. *Albee*, 20 Minn. 159 ; *Adams* v. *Hastings, &c., Rd. Co.*, 18 Id. 265 ; *Troy* v. *Cheshire Rd. Co.*, 23 N. H. 102 ; *O'Riley* v. *McChesney*, 3 Scam. 278 ; affirmed, 49 N. Y. 672 ; *Seely* v. *Alden*, 61 Penn. St. 302 ; *Cumberland, &c., Co.* v. *Hitchings*, 65 Me. 140 ; *Elizabethtown, &c., Rd. Co.* v. *Combs*, 10 Bush 382 ; see *Cadle* v. *Muscatine, &c., Rd. Co.*, 44 Ia. 11 ; *Simpson* v. *Keokuk*, 34 Id. 568.

In an action for enticing away an apprentice, damage does not include the loss of services for the residue of his term to come after the trial, for the apprentice may return : *Hambleton* v. *Veere*, 2 Saund. 170 ; *Moore* v. *Love*, 3 Jones L. 215 ; *Trigg* v. *Northcut*, Litt. Sel. Cas. 414 ; *Hodsoll* v. *Stellebrase*, 11 A. & E. 301 ; *Lewis* v. *Paachey*, 1 H. & C. 518 ; see *McKoy* v. *Bryson*, 5 Ired. L. 216. And this is true even though the apprentice enlist in the public service, or in the army or navy : *Covert* v. *Gray*, 34 How. Pr. 450.

And where the defendant enticed away the plaintiff's wife, it was held that recovery would be had only up to the time of bringing the action ; for the detention after that time a new action could be maintained : *Brasfield* v. *Lee*, 1 Ld. Raym. 329.

W. W. THORNTON.

Crawfordsville.

Supreme Court of Missouri.

BENT, RECEIVER ST. LOUIS MUTUAL INS. CO., *v.* PRIEST.

Where a director receives property as an inducement of and consideration for his vote and influence in a proposed contract with the corporation, he is a trustee of such property, and it may be recovered from him in a suit by a receiver of the corporation.